No. 79-1356

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OCTOBER TERM, 1979

KATHY SUE JOHNSON, ET AL., PETITIONERS,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Chicago Board of Education may constitutionally impose racial quotas on enrollment at two of its integrated high schools where (a) the quota plans lead to the exclusion and segregation of a substantial number of black students and are therefore presumptively invalid under the Equal Protection Clause, and (b) the Board failed to show that its asserted objectives of preventing segregation and overcrowding were its actual objectives and that these objectives could not be achieved by less discriminatory alternatives.

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INTEREST OF THE UNITED STATES

The United States has substantial enforcement responsibilities with respect to school desegregation under Titles IV, VI and IX of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, 2000d and 2000h-2, and under the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.* In addition, the United States has a policy of encouraging school boards voluntarily to eliminate minority group isolation and segregation among students and faculty. 20 U.S.C. 1716, (Supp. II) 3191-3207. The United States has participated either as a party or as amicus curiae in virtually all of the Court's school desegregation cases.

STATEMENT

This case arises out of two suits filed by petitioners on March 15, 1976 (and later consolidated), challenging racial enrollment quotas ("Student Racial Stabilization Quota Plans") imposed by the Chicago Board of Education in 1975 and 1976 at two of its integrated high schools—Gage Park High School (Gage Park) and Morgan Park High School (Morgan Park) (Pet. App. A2).[1] The stated purposes of the quotas were to reduce overcrowding and to prevent the two schools from becoming increasingly black (Pet. App. A36; R. 33 at 3-6). The quota levels for the admission of black students were deliberately set at a lower level than the number of blacks who would have enrolled in the absence of the plans (*ibid.*). As a result of the quotas, between 1975 and 1977 approximately 1630 black students were denied the opportunity, available to all

[1] "Pet. App." refers to the appendix to the petition for certiorari; "Op. Cert." refers to respondents' brief opposing certiorari; "A." refers to the joint appendix to the briefs in this Court; "R." refers to the consecutively paginated record filed with the court of appeals. References to "Pltf. Ex." and "Def. Ex." are to exhibits submitted by petitioners and respondents respectively. Those exhibits were received into evidence at R. 47 at 3, R. 50 at 1-2, and R. 71, and they are described in lists attached to orders at R. 47 and R. 50, and in the order at R. 71. Unless otherwise stated, cited exhibits are from the list attached at R. 47. Objections initially made (R. 47) to certain exhibits cited in this brief were later withdrawn (R. 50 at 2). "Stip." references are to the numbered paragraphs in the Statement of Uncontested Facts attached to the Final Pretrial Order (R. 47).

other high school students in Chicago, to attend their respective "neighborhood" high schools (Pet. App. A14, A42–A45, A47; Stips. 17, 27–29). The majority of the students excluded under the quotas attended virtually all-minority schools instead (Pet. App. A42–A44, A47).

A. *General Background*

The Chicago public school system is organized into 27 geographic districts, with student enrollments ranging from 9,284 to 31,508. In 1976, when these suits were filed, it operated 669 schools and enrolled 524,221 students of whom 24.9% were white, 59.4% black, 14.1% Hispanic and 1.6% other (Pltf. Ex. 2.).

The Chicago public schools exhibit a high degree of racial imbalance. During the last 15 years, the Chicago Board of Education ("the Board") has been urged by both the state and the federal governments to eliminate or reduce segregation.[2] Despite these pressures, in 1976, 79% of the elementary schools and 67% of the high schools remained at least 85% minority or 85% majority.[3]

At the secondary level, the Board operates 75 schools, including general high schools, vocational schools, and technical schools (Pltf. Ex. 2, 13). The 51 general high schools and the 9 "branch" high schools are organized on a neighborhood basis, while the other secondary schools generally admit students from throughout the city (See Pet. 4; Def. Ex. 1; R. 13 at 10–11). The white student enrollment in the general and technical high schools exceeds

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[2] U.S. Commission on Civil Rights, *Desegregation of the Nation's Schools: A Status Report* 35–36 (1979). On April 9, 1979, the Department of Health, Education and Welfare (now the Department of Education) notified the Board that it was ineligible for funding under the Emergency School Assistance Act (20 U.S.C. (Supp. II) 3191–3207) and asked the Board to explain why it was not also in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. On April 21, 1980, the United States Department of Justice gave notice to the Board of its intent to file suit under Titles IV and VI of the Civil Rights Act of 1964 unless voluntary compliance was forthcoming. The Department of Justice is currently engaged in pre-suit negotiations with the Board to obtain voluntary compliance with these statutes.

[3] See Pltf. Ex. 2. Excluded from this calculation, from our subsequent discussion, and from the figures supplied in Appendix A and Appendix B to this brief are 10 special schools such as the Spalding School for the Physically Handicapped and the Industrial Skill Center.

the systemwide average of 24.9%, while the vocational schools are disproportionately black.[4]

A substantial number of the high schools operate in excess of their "permanent capacity" (App. A, *infra*).[5] Many of those "overutilized" schools, defined by the Board as schools operating in excess of the average utilization level of the schools (see Pet. App. A44), use mobile classrooms to alleviate overcrowding.[6]

B. *The "Student Racial Stabilization Quota Plans"*

Gage Park (No. 34) is located on the southwest side of Chicago in District 12, which is 75% white (Pltf. Ex. 2; see App. B, *infra*).[7] It is generally positioned between all-minority schools on the east and predominantly white schools on the north and west. In 1975, Gage Park was approximately 41% white and 59% minority, and was operating at 106% of its capacity, with a total enrollment of 2,441 (Pet. App. A34–A35).

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[4] Of the students attending general and technical high schools, 31.4% are white, while 9.3% of the students enrolled in vocational schools are white (Pltf. Ex. 2).

[5] Permanent capacity is determined by the Board under a formula that takes into account the number of instructional areas (such as classrooms, laboratories, shops and gymnasiums), the average class size, the total number of class periods in a regular school day, and "the percent of use of space." The formula excludes "temporary facilities," which include mobile classrooms and branch schools (Pltf. Ex. 16).

Appendix A ("App. A") to this brief lists enrollment and utilization figures for 1975 and 1976 taken from exhibits in the record. As shown there, the utilization levels in the high schools ranged from 49.7% to 157.1% in 1975 (Pltf. Ex. 14). The average utilization level for the general high schools was 101.3% of permanent capacity (Pet. App. A44). Twenty-two of the 51 general high schools exceeded that level in 1975, and 29 exceeded that level in 1976 (*ibid.*). In 1975, five of the ten vocational schools exceeded 105.2%, the average utilization level for vocational schools. In 1976, six vocational schools exceeded the average level of 106.3% (Pltf. Ex. 14, 15).

[6] In 1975, 107 mobile classrooms were in use at the secondary level, distributed among 14 schools. In 1976, 108 units were used at 16 schools (Pltf. Ex. 14, 15).

[7] "App. B" refers to the map reproduced as an appendix to this brief showing the location and racial composition of the Chicago high schools in each district in 1976. Schools shown there are identified by number, and we have placed these identifying numbers in parentheses following school names cited in the brief to facilitate reference to the map.

The Gage Park quota plan, which went into effect in September 1975, established a ceiling on enrollment of 2,800 students and placed a school-wide racial quota on admissions, providing that students be admitted in numbers that would maintain an enrollment that was 48% black, 42% white, 8% Hispanic and 2% "principal's option" (Pet. App. A35).

The three other high schools in District 12—Curie (No. 33), Kelly (No. 36), and Kennedy (No. 39)—have predominantly white enrollments.[8] Two additional high schools with virtually all-white enrollments—Bogan (No. 43) and Hubbard (No. 45)—are located in District 15, immediately south of Gage Park.[9] With the exception of Curie, in 1976 all of these schools had utilization levels exceeding that of Gage Park.[10] Curie was underutilized, operating at 87.7% of its permanent capacity (App. A, *infra*).

Morgan Park (No. 53) is located on the far south side of Chicago in District 18, which is 21.3% white (see App. B, *infra*). In 1976, 38% of the students enrolled at Morgan Park were white and 62% were black, and the school was operating at 128.6% of its permanent capacity (Pet. App. A34).[11] On March 10, 1976, the Board adopted a racial quota plan for Morgan Park. The Morgan Park plan limited the enrollment of incoming ninth graders to 700 students, to be divided approximately 50% white and 50% black (Pet. App. A35–A36).[12]

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[8] In 1976, Curie was 75.7% white, Kelly was 78.1% white and Kennedy was 89% white (Pltf. Ex. 2; App. B, *infra*).

[9] Bogan was 97.4% white in 1976 and Hubbard was 93.4% white (Pltf. Ex. 2; App. B, *infra*).

[10] Kelly (141.5%); Kennedy (110.4%); Bogan (126.6%); and Hubbard (110.1%) (Pet. App. A44); App. A, *infra*). Kelly used two branch schools to reduce its utilization level to 101.0%. Kennedy used five mobile classrooms, which reduced its utilization level to 102.3%, and Bogan used four mobiles, for 118.7% utilization.

[11] Including the four mobile classrooms at Morgan Park and its branch school, Clissold, the utilization level in January 1976 was 108% (Pltf. Ex. 14).

[12] One other public high school in Chicago limits the enrollment of incoming students on the basis of race—Whitney M. Young, Jr. (Young) (No. 25), a magnet school emphasizing science, medical arts and performing arts, which is open to any high school student in the city so long as the prescribed racial balance (40% white, 40% black,

Until June 1977, the Board operated a separate branch for some Morgan Park ninth graders at Clissold, a predominantly white elementary school approximately six blocks west of Morgan Park (R. 12 at 3–4a). The Clissold branch historically has been all-white, while the ninth grade in the main building has been heavily black.[13] The quota applied to all incoming ninth graders as a group, without distinguishing between the Clissold branch (94.8% white in 1976) and the main building (68% black) (R. 12 at 4a).

Although the other high school in District 18, Julian (No. 52), is virtually all-black, there are several predominantly white schools in the vicinity of Morgan Park, including Bogan, Hubbard, and Washington (No. 51) (App. B, *infra*). Washington also was overutilized.[14]

According to the Board, the enrollment quotas were necessary to relieve overcrowding and to prevent the two high schools from becoming increasingly black (Pet. App. A36). During the four years immediately preceding adoption of the plans, the black enrollments at both schools had increased.[15] While black enrollments were rising, however, the racial composition of students attending both public and non-public schools in the two attendance areas in 1976 remained in excess of 50% white (Pet. App. A34–A35).

C. *Community Meetings Preceding the Plans*

Before adopting the plans, designated Board committees held public meetings with community members in Gage Park and Morgan Park (R. 16 at 2–5). While the parents

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10% Hispanic, 5% other and 5% principal's option) is maintained (R. 8 at 21).

[13] In the years 1972 through 1975, white enrollment at the Clissold branch ranged from 95.2% to 98.6%. Ninth grade black enrollment at the main building ranged from 74.6% to 81.8% (R.12 at 4a).

[14] In 1976, Washington was 93.2% white, was operating at 115.8% of its permanent capacity, and used four mobile classrooms to alleviate overcrowding (108.1% overall utilization) (Pltf. Ex. 15).

[15] Between 1972 and 1974, black student enrollment at Gage Park rose from 1,056 to 1,361. Between 1972 and 1975, the total enrollment at Morgan Park increased from 3,092 to 3,423, with black student enrollment increasing from 52.3% to 62.3% and white student enrollment declining from 45.7% to 36.9% (Pet. App. A34–A35).

attending the Gage Park meeting were primarily concerned with alleviating overcrowding at Gage Park (Def. Ex. 35), the parents who attended the two Morgan Park meetings were generally opposed to the enrollment quotas (Pltf. Ex. 74, 75; R. 50 at 2). They questioned the fairness of excluding from Morgan Park black students who, they feared, would then attend segregated rather than integrated schools (Pltf. Ex. 74 at 10, 27–28, 29). Two community members questioned the Board's good faith in proposing the enrollment quotas (*id.* at 44, 46) and suggested that if integration were truly the Board's goal, it would adopt a broad plan "as opposed to trying to take this little corner and use it as the basis on which to start * * *" (*id.* at 46). The chairperson of the Board committee at the Gage Park meeting stated that she saw no alternative means of reducing overcrowding and preserving integrated enrollments (Pltf. Ex. 75 at 33). One Morgan Park parent suggested that students excluded under the plans be assigned to one of the predominantly white high schools on the south side,[16] but the Board staff indicated that the enrollment at these schools exceeded their permanent capacities, excluding mobile classrooms (*id.* at 28, 38–40).

After the meetings, the committees recommended adoption of the plans (A. 24–25). The full Board accepted the committees' recommendations without comment (Def. Ex. 2, 3).

D. *Operation and Impact of the Plans*

Pursuant to the plans, lotteries were conducted each year in preparation for upcoming academic years, beginning in 1975 for Gage Park and 1976 for Morgan Park. Separate lottery lists were made for white, black, and (at Gage Park) Hispanic students[17] from a list of eligible eighth grade students. Students were admitted in the order that their names appeared on the lottery lists until the quota for their race was filled (Pet. App. A37). In each

[16] "I think that if you want integration, then you open up every school on the south side, Bogan and give them the option for Bogan, Washington, Kennedy—open it—the whole Area A, and if you can't do that and everything, forget it, because it is not fair" (Pltf. Ex. 74 at 28 (Mrs. Thomas)).

[17] Morgan Park has no significant Hispanic enrollment (Pet. App. A10).

year, all white students included in the lotteries or subsequently applying for admission were allowed to enroll (Pet. App. A38–A39). Black and Hispanic students denied admission were placed on a "waiting list" and were offered the opportunity to attend Morgan Park or Gage Park if another previously admitted student of the same race elected not to attend (Pet. App. A39). At Gage Park, additional black or Hispanic students were admitted if additional white students elected to attend, so long as the prescribed racial balance was maintained (Pet. App. A39).

A total of 1630 black students were excluded by the lotteries from the two schools between 1975 and 1977: from Gage Park, 416 in 1975, 539 in 1976, and 329 in 1977; from Morgan Park, 193 in 1976 and 157 in 1977 (Pet. App. A42–A45; Stip. 27–29). As the plans were originally implemented, the excluded students were instructed to attend one of 18 "underutilized" (below 101.3% of capacity) general high schools in the City (Pet. App. A39–A40). Excluded students were also allowed to attend one of four vocational and technical schools, all of which exceeded 97% minority and were overutilized.[18] At 11 all-minority high schools (including the four vocational schools), certain numbers of students (ranging from 20 to 100) were guaranteed admission regardless of the effect on capacity; but students were admitted to the remaining underutilized schools only until the schools reached capacity (R. 16 at 12).

Those 18 general high schools were the same schools that were eligible to receive transfer students under the Board's Permissive Transfer Program (PTP), first established in 1963. Under the PTP, every student attending an overutilized high school in the city (which included Gage Park and Morgan Park) had the option of traveling at his or her own expense to one of the underutilized schools, regardless of the impact of the transfer on the racial balance of the sending or receiving school (Pet. App. A39–A40; Def. Ex. 27, at 7). Since receiving general high schools were limited to underutilized ones, excluded stu-

[18] These schools were Chicago Vocational (No. 48) (99.1% black; 108.4% utilization in 1976), Dunbar Vocational (No. 32) (99.5% black; 130.4% utilization), Lindblom Technical (No. 46) (97% black; 116.8% utilization), and Simeon (No. 60) (100% black; 129.6% utilization) (R. 16 at 12) (see App. A and App. B, *infra*).

dents were not permitted to attend Kelly (No. 36), Kennedy (No. 39), Bogan (No. 43), Hubbard (No. 45) and Washington (No. 51)—predominantly white schools on the south side not far from Gage Park and Morgan Park (Pet. App. A44; App. B, *infra*). Neither were they allowed to attend the nearby and underutilized Curie High School (No. 33) under the PTP (App. B, *infra*).

As stipulated by the Board, only six of the 18 alternative schools had significant white enrollments in 1976,[19] and all six were located on the north side of Chicago. The closest (Lakeview) (No. 7) was 11.4 miles from Gage Park and 18.15 miles from Morgan Park (Pet. App. A41). The Board conceded that it had no knowledge of the travel time or travel routes between Morgan Park and Gage Park and these schools when it devised its plans, and referred excluded students to the Chicago Transit Authority for such information (R. 12 at 13). According to the Chicago Transit Authority, travel to one of the white or integrated schools by means of public transportation required (1) taking a bus to the Dan Ryan rapid transit line, (2) transferring from the Dan Ryan to the Howard or Ravenswood rapid transit lines, (3) travel on the Howard or Ravenswood rapid transit lines, and (4) in two instances, an additional bus trip to the school (Pet. App. A41). In 1975, when the Gage Park plan was adopted, the Board refused to reimburse excluded students for their transportation costs, but in 1976 agreed to offer them carfare (Pet. App. A40).

Of the 1,148 black students excluded under the plans in 1975 and 1976, none attended the six northside high schools with significant white enrollments. The vast majority (all but 48) attended segregated schools (85% or more minority) generally located closer to their residences.[20] At least 420 students attended overcrowded

[19] Roosevelt (No. 1) (76% white); Von Steuben (No. 3) (63.2% white); Mather (No. 4) (89.6% white); Sullivan (No. 5) (73.4% white); Lakeview (No. 7) (43.6% white); and Senn (No. 66) (44% white) (Stip. 25; see also Pet. App. A13, A41). Two additional alternative schools had white enrollments exceeding 15%: Kenwood (No. 42) (26.4% white in 1976) and Wells (No. 17) (16.3% white) (Pet. App. A41). Kenwood is 5.23 miles from Gage Park and 8.65 miles from Morgan Park, and Wells is 7.6 miles from Gage Park and 14.25 miles from Morgan Park (Pltf. Ex. 12).

[20] Of the 193 students excluded in 1976 from Morgan Park, 191 attended alternative schools with enrollments over 99% minority. Nearly

minority schools not on the PTP list (see Pet. App. A41-A44; App. A, *infra*).[21] Only 48 students attended schools with white enrollments exceeding 15%; seven of the eight schools which they attended were not on the PTP list and four were overcrowded (Pet. App. A41-A44).[22]

E. *Modification of the Plans*

On June 29, 1977, the scheduled trial date in the district court, the Board informed the court that it was considering modifying the plans, and it waived its right to present testimony. The court then stated that it was prepared to find the plans as originally adopted unconstitutional, but would reserve final ruling pending any modification the Board might wish to present (Pet. App. A45).

In response to the court's suggestion that the plans be modified, petitioners suggested several alternative means of preserving integrated student bodies at Gage Park and Morgan Park, including a broader desegregation plan, in-

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all of the excluded students not attending a technical or vocational high school (110 of 117 students) attended Carver High School (No. 72) (100% black), the closest underutilized school to Morgan Park (Pet. App. A44); see also App. B, *infra*. When the Board committee initially recommended to the full Board that an enrollment quota be imposed at Morgan Park, it designated Carver as the primary receiving school for students excluded under the plan (Pltf. Ex. 4). In its final recommendation the committee stated that students who could not "be accommodated at Morgan Park will be permitted to attend any under-utilized facility in the city" without naming specific receiving schools (Pltf. Ex. 8). Carver High School was one of the 18 underutilized schools later listed as available to excluded students (Pet. App. A41).

Before the enrollment quotas were instituted at Gage Park, some students residing in the Gage Park attendance area had the option of attending either Gage Park or Harper (No. 44) (100% black; 115.5% utilization in 1976) (Def. Ex. 35 at 43-44). See App. B, *infra*. Students excluded by the Gage Park lottery were encouraged by the Gage Park principal to exercise this option (Def. Ex. 22), and a substantial number (200 out of 855 in 1975 and 1976) attended Harper (Pet. App. A42-A43).

[21] Data with respect to 99 of the 416 students excluded from Gage Park in 1975 is unavailable (Pet. App. A42; Stip. 27). Data is also unavailable for students excluded from Morgan Park who attended technical or vocational school (Pet. App. 44; Stip. 29, see note 20, *supra*).

[22] See App. A, App. B, *infra*. Twenty-seven of the 48 students attended Kenwood (26.4% white in 1976), a PTP receiving school. The remaining students were scattered among the seven other schools (Pet. App. A42-A43).

tegration of the predominantly white schools near Morgan Park and Gage Park, and two pairing proposals (Pet. 9; R. 71, Letter of July 22, 1977, at 4–6). The first pairing proposal, involving Morgan Park (No. 53) and Washington (No. 51) (93.2% white in 1976), was rejected by the Board because it would involve the continued use of mobile classrooms (R. 71, Letter of Aug. 3, 1977, at 7). The second proposal was to pair Gage Park (No. 34) with Curie (No. 33) (76% white in 1976), which was operating under its capacity and is within two miles of Gage Park (Pet. 9; R.71, Letter of July 22, at 4–6). See App. B, *infra*. According to the Board's counsel, no more than 100 black students from Gage Park and Morgan Park could be allowed to attend Curie, even though the addition of 100 students would only raise Curie's utilization level to 90%, because "a large influx of minority students" would be "educationally disruptive" in the "highly volatile" area of Marquette Park, where Curie is located (A. 35–36).

Rather than adopt these proposals, the Board expanded from six to ten the number of white or integrated schools offered to students excluded under the quotas and agreed to provide bus transportation to those ten schools. Up to 1,262 spaces were reserved at these schools for Gage Park transfer students and up to 390 spaces were reserved for Morgan Park transfer students (A. 27; Pet. App. A46). Three of the four new schools were located on the north side of Chicago, in the same general area as the original six.[23] The fourth school was Curie, at which the Board reserved a maximum of 50 spaces for students excluded from Gage Park and 50 for those excluded from Morgan Park (Pet. App. A46).

As of October 1977, 102 of the 1,632 black students denied admission to Morgan Park and Gage Park under the plans were participating in the transportation program (Pet App. A47). The Board reported that as of October 1978, 359 students had elected to participate in the transportation program (Pet. App. A14).

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[23]The closest (Lane Tech) (No. 8) was 10.64 miles from Gage Park and 17.48 miles from Morgan Park (Pltf. Ex. 12). The other two were Taft (No. 2) and Schurz (No. 14). See App. B, *infra*.

F. *The lower court opinions*

On December 30, 1977, the district court entered its findings of fact and conclusions of law based on the documentary record (Pet. App. A33–A49). It held that the plans as originally adopted were unconstitutional "in that they did not give excluded students a viable opportunity to attend other integrated schools" but that the constitutional defect was cured by the 1977 modification providing bus transportation (Pet. App. A48).[24] The district court also found that the plans were successful in achieving the Board's dual objectives of relieving overcrowding and promoting integration (Pet. App. A40). It issued a permanent injunction directing the respondents to continue the modified transfer plan (Pet. App. A49).

The court of appeals affirmed (Pet. App. A1–A28). It found that the Board had a compelling interest in preventing *de facto* segregation at Morgan Park and Gage Park High Schools (Pet. App. A22).[25] Without examining the Board's intent, the court characterized the plans as "a good faith effort to stabilize the enrollments at Gage Park and Morgan Park High Schools, and to promote integration not only at these two high schools but also at the alternative high schools designated under the Plans" (Pet. App. A22). The court also held that "local school authorities may legitimately take into account the phenomenon of white flight in formulating voluntary programs designed to achieve integration" (Pet. App. A22). Addressing the means chosen by the Board to implement its objectives, the court deferred to the discretion of the Board, stating (Pet. App. A27): "[T]he mechanics of integration, particularly in the circumstances of voluntary remedial action, where the purpose is obviously to implement the promise of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and effectively achieves that objective, [are] ordinarily a matter within the discretion of local school authorities."

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[24] The district court did not make findings on the length of the bus rides to the white or integrated schools under the modified plans.

[25] Petitioners did not contend that the trend toward higher minority enrollments at Gage Park and Morgan Park was the result of segregative actions of the Board.

SUMMARY OF ARGUMENT

1. At issue in this case are racial enrollment quotas imposed at two integrated high schools in a highly segregated school system, ostensibly for the purposes of promoting integration and reducing overcrowding at the two schools. The quota plans were designed to exclude black students, but not whites, from their integrated neighborhood schools and in fact operated not only to exclude black students but to divert most of the excluded students into all-minority schools. As express racial classifications that exclude and segregate black students, the quotas embody precisely those evils inherent in the dual school systems condemned by this Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

The traditional deference owed to local school authorities and the permissibility of voluntary race-conscious measures to achieve racial balance in a school district do not relieve the race-conscious segregative practice here from the most exacting form of review. *Brown* is merely an illustration of an established constitutional principle: express racial classifications that discriminate against a historically disadvantaged minority group are presumptively the product of invidious intent, and those defending them bear a heavy burden of justification. Under this strict standard, the responsible governmental entity can rebut the presumption of unconstitutionality only by demonstrating—not merely asserting—that the classifications are necessary to the achievement of a permissible and substantial governmental purpose and that the purpose could not be achieved by any less discriminatory alternative.

2. In this case the Board did not carry its heavy burden of rebutting the presumption. First, it failed to show that its ostensible objectives of promoting integration and avoiding overcrowding were its actual objectives. To the contrary, the record strongly suggests that the Board's intent was invidious: it was concerned merely with stabilizing white enrollment at Gage Park and Morgan Park without disturbing white majorities elsewhere in the school system, and it was responding primarily to the prejudices of whites rather than to concerns about the consignment of black students to all-minority schools. Thus the Board

gave the excluded black students the option of attending nearby schools with heavy black majorities or distant white and integrated schools; and it refused to permit the students to attend nearby white or integrated schools. The transfer options were therefore structured in such a way as to make it foreseeable that most of those students would end up attending nearby virtually all-minority schools. Moreover, Board policies, both express and tacit, were inconsistent with both asserted objectives. For example, the Board expressly authorized the excluded students to attend overutilized vocational and technical schools with virtually all-minority enrollments while maintaining that the reason for barring them from nearby white and integrated schools was that the latter were overutilized. The Board strongly confirmed the presumption of invidious intent when, through its counsel, it rejected a school pairing proposal on the ground that a large influx of minority students would be "disruptive" in a "volatile" predominantly white area.

The Board also failed to show that, even assuming that its asserted objectives were its actual objectives, they could not have been achieved by less discriminatory means. It did not seriously consider alternative plans that would not divert black students from their integrated neighborhood schools into segregated schools and it offered no expert testimony justifying the means it chose. Included among the possible plans ignored by the Board are permissible race-conscious measures, such as school pairing, redistricting, magnet schools, and more comprehensive desegregation plans. Such plans would result in a net decrease in segregation in the school system generally without diverting black students from integrated schools to segregated schools and would more equitably distribute the burdens among students of all races.

Rather than attempt to demonstrate that it gave adequate consideration to alternative means of achieving its goals, the Board simply asserts that racial quotas are a necessary means of preventing "white flight." But just as the possibility of white flight cannot justify a failure to move towards eliminating *de jure* segregation (*Monroe* v. *Board of Commissioners*, 391 U.S. 450, 459 (1968)), so adverse public reaction to increasing minority enrollments cannot justify a plan that discriminates against minority

students by excluding them from their neighborhood schools and segregating them in other schools, while allowing white students to attend their neighborhood schools even when those schools enroll heavy white majorities.

ARGUMENT

THE ENROLLMENT QUOTAS ARE UNCONSTITUTIONAL BECAUSE, AS EXPRESS RACIAL QUOTAS THAT EXCLUDE BLACK STUDENTS FROM INTEGRATED SCHOOLS, THEY ARE PRESUMPTIVELY INVALID UNDER THE EQUAL PROTECTION CLAUSE AND THE BOARD HAS NOT REBUTTED THE PRESUMPTION

A. *Applicable Principles*

This case concerns racial enrollment quotas imposed at two integrated public high schools that were (1) designed to limit black student enrollment to numbers lower than the numbers who could be expected to apply and (2) in fact operated to exclude substantial numbers of black students from those schools and divert most of them to schools that were virtually all-minority.

These practices—which substantially deviated from normal Board policy—were purportedly adopted to promote racial integration and reduce overcrowding at Gage Park and Morgan Park high schools. In our view the traditional deference owed to local school authorities (see *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 42 (1973)) and general approval of voluntary race-conscious measures to achieve racial balance in a school district (see *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971)) do not relieve the race-conscious segregative practice here from the searching scrutiny which normally attends race-conscious action that prefers one racial or ethnic group over another. *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980), slip op. 20-21, 4 (opinion of Burger, C.J.); *id.*, slip op. 2 (opinion of Marshall, J.); see generally, *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). Indeed, as

measures taken by school authorities that purposefully exclude minority students from particular integrated schools, and result, in most cases, in their enrollment in virtually all-minority schools, the quotas fall within the prohibition of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) ("*Brown I*") against purposeful segregation of students in a public school system; for measures that "are intended to, and [do] in fact, discriminate against minority pupils" constitute invidious discrimination whether they are imposed by state law or merely devised by school authorities. *Dayton Board of Education* v. *Brinkman*, 443 U.S. 406, 420 (1977). Accord, *Keyes* v. *School District No. 1*, 413 U.S. 189, 201–203 (1973).

The school segregation laws invalidated in *Brown* are classic examples of express racial classifications that prefer a majority racial group over a less powerful minority and that therefore require the most exacting form of review. See, *e.g.*, *Hunter* v. *Erickson*, 393 U.S. 385, 391–392 (1969); *Loving* v. *Virginia*, 388 U.S. 1, 9 (1967); *Goss* v. *Board of Education*, 373 U.S. 683 (1963). Put another way, explicit racial classifications that thus discriminate against members of a group who are "saddled with such disabilities or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" (*San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 28 (1973)) are "constitutionally suspect" (*Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954)) and carry a presumption of invidious or discriminatory purpose (*Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 272 (1979)).[26] Ac-

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[26] Invidious classifications are those by which one group is subjected to disparate treatment based not on rational, neutral considerations but on bias, prejudice, or antipathy toward the classified group. See *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 593 n.40 (1979). Invidious intent "implies more than intent as volition or intent as awareness of consequences * * *. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Ibid.*

"Certain classifications * * * in themselves supply a reason to infer antipathy. Race is the paradigm." *Personnel Administrator of Massachusetts* v. *Feeny*, *supra*, 442 U.S. at 272. Thus, with respect to the standard for proving discriminatory purpose, express racial classifications are unlike classifications that may have a disproportionate racial

cordingly, they bear a "heavy burden of justification" (*Loving* v. *Virginia*, *supra*, 388 U.S. at 9), and will be upheld only where "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964).

That heavy burden cannot be met by merely *asserting* a substantial legitimate purpose—such as preventing overcrowding and segregation in the school system. As this Court observed in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975): "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying [the challenged classification]." A racial classification that purports to be remedial or well-intended may be in fact the product of invidious intent, as traditional racial classifications have been. *Fullilove* v. *Klutznick*, *supra*, slip op. 2–3 (opinion of Marshall, J.); *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 356–358 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 173–174 (1977) (Brennan, J., concurring).[27] Instead, the Board must demonstrate that its asserted objective was its actual objective. In addition the Board must demonstrate that this objective could not be accomplished by less discriminatory alternatives. *Loving* v. *Virginia*, *supra*, 388 U.S. at 11; *Lee* v. *Nyquist*, 318 F. Supp. 710, 720 (W.D.N.Y. 1970) (three-judge court), aff'd, 402 U.S. 935 (1971).

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impact but do not on their face involve considerations of race. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

[27] This case does not present the question, and the Court accordingly need not consider, the appropriate standard of review for race-conscious programs that disadvantage nonminorities. Compare *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 299 (opinion of Powell, J.) with *id.* at 356–362 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); and compare *Fullilove* v. *Klutznick*, *supra*, slip op. 40 (opinion of Burger, C.J.) with *id.* slip op. 3 (opinion of Marshall, J.). Earlier cases (*e.g.*, *Bolling* v. *Sharpe*, *supra*, 347 U.S. at 499) state simply that racial classifications are suspect and require strict scrutiny; but those cases all concerned classifications that excluded or otherwise burdened members of historically disadvantaged minority groups—the kind of exclusion involved here.

While both voluntary and court-ordered desegregation plans require consideration of race (*McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971)), most such plans are not presumptively invalid because, unlike the plans here, (1) they result in a net decrease in segregation in the school system generally, without shifting black students from integrated to segregated schools and (2) they affect whites as well as blacks.[28] Even under the most exacting standard, properly designed voluntary desegregation plans can withstand judicial scrutiny. See, e.g., *Parent Association of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705 (2d Cir. 1979) (discussed *infra*, pages 30–31). Many different race-conscious measures that do not contain the exclusionary and segregative features of the plans at issue here have been successfully used to promote integration.[29]

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[28] Although students have no absolute right to attend a particular school, *McDaniel* v. *Barresi*, *supra*, 402 U.S. at 42, they have a right not to be singled out for disadvantageous treatment on the basis of their race, absent justification. *Hunter* v. *Erickson*, *supra*. For this reason, a desegregation plan that imposes a disproportionate burden of integration on a particular racial or ethnic group must be justified by school authorities. See, *e.g.*, *NAACP* v. *Lansing Board of Education*, 559 F.2d 1042 (6th Cir.), cert. denied, 434 U.S. 997 (1977); *Arvizu* v. *Waco Independent School District*, 495 F.2d 499, 504–507 (5th Cir. 1974); *Clark* v. *Board of Education*, 449 F.2d 493, 499 (8th Cir. 1971), cert. denied, 405 U.S. 936 (1972); *Lee* v. *Macon County Board of Education*, 448 F.2d 746, 753–754 (5th Cir. 1971); *Felder* v. *Harnett County Board of Education*, 409 F.2d 1070, 1074 (4th Cir. 1969). The courts examine both the validity of the school board's justification for the proposals and the availability of feasible alternatives. See, *e.g.*, *Arvizu* v. *Waco Independent School District*, *supra*; *Moss* v. *Stamford Board of Education*, 350 F. Supp. 879 (D. Conn. 1972). Because the plans at issue here impose a far greater injury—that of segregation—it is unnecessary to decide whether the plans would satisfy constitutional requirements if they only had the effect of removing minority students from their local integrated schools.

[29] See, *e.g.*, *Martin* v. *Charlotte-Mecklenburg Board of Education*, No. 79-1586 (4th Cir. July 23, 1980) (pupil reassignment plan to prevent any school in school system from exceeding 50% minority enrollment); *Parent Association of Andrew Jackson High School* v. *Ambach*, *supra* (transfer option for minority students attending all-minority high school to high schools exceeding 50% white); *Zaslawsky* v. *Board of Education*, 610 F.2d 661 (9th Cir. 1979) (faculty integration plan requiring faculty at every school in district to be within 10% of the district-wide average of 30% minority) *Darville* v. *Dade County School Board*, 497 F.2d 1002 (5th Cir. 1974) (clustering of three junior high schools to maintain racial balance); *Higgins* v. *Board of Educa-*

Moreover, this Court has expressly approved a number of "desegregation tools" requiring consideration of race, including realignment of attendance zones, pairing or clustering of both contiguous and noncontiguous attendance zones, student reassignment and transportation, and majority-to-minority transfer provisions. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 26–31. Additional techniques include magnet schools,[30] relocation of portable classroom units, school consolidation, construction of new school buildings, and school closings. *Cisneros* v. *Corpus Christi Independent School Dist.*, 467 F.2d 142, 152–153 (5th Cir. 1972). See also 20 U.S.C. 1713.

The enrollment quota plans at issue here differ in significant respects from those types of permissible race-conscious measures and, instead, bear striking resemblances to the student transfer program condemned by this Court in *Goss* v. *Board of Education*, 373 U.S. 683 (1963). In *Goss*, black students challenged a transfer policy adopted by the school board as part of its desegregation plan. The policy permitted a pupil to transfer from a school in which his race was in the minority to a school

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tion, 508 F.2d 779 (6th Cir. 1974) (selection of sites for new schools which maximized integration); *Pride* v. *Community School Board*, 488 F.2d 321 (2d Cir. 1973) (reassignment of minority students from segregated schools to majority race schools); *Porcelli* v. *Titus*, 431 F.2d 1254 (3d Cir. 1970), cert. denied, 402 U.S. 944 (1971) (integration of public school faculties); *Springfield School Committee* v. *Barksdale*, 348 F.2d 261 (1st Cir. 1965) (board resolution to adopt plan to integrate students); *Guida* v. *Board of Education*, 26 Conn. Supp. 121, 213 A. 2d 843 (1965) (pairing of two junior high schools to maintain racial balance); *Balaban* v. *Rubin*, 14 N.Y. 2d 193, 199 N.E. 2d 375 (1964), cert. denied, 379 U.S. 881 (1964) (rezoning to racially balance new junior high school); *Morean* v. *Board of Education*, 42 N.J. 237, 200 A. 2d 97 (1964) (junior high student assignment plan designed to maximize racial balance).

[30] Magnet schools are designed to attract students to a school because of special career, vocational, or other programs offered. They generally recruit students on a systemwide basis and use admission goals to maintain racial balance. Although magnet schools by themselves are normally not sufficient to desegregate an entire school system, they have been successfully used in a number of cities to attract students of all races to a particular school. See, *e.g.*, *Tasby* v. *Estes*, 572 F.2d 1010, 1014 n.12 (5th Cir. 1978), cert. dism., Nos. 78–253, 78–282, 78–283 (Jan. 21, 1980); *Morgan* v. *Kerrigan*, 530 F.2d 401, 410 (1st Cir. 1976).

where his race was in the majority. The plaintiffs argued that the transfer policy was unconstitutional because it was based solely on racial factors that inevitably led to segregation. Viewing the plan as not only an inadequate remedy for *de jure* segregation but also an independent violation of the Fourteenth Amendment, the Court agreed, explaining (373 U.S. at 688-689):

> The recognition of race as an absolute criterion for granting transfers which operate only in the direction of schools in which the transferee's race is in the majority is no less unconstitutional than its use for original admission or subsequent assignment to public schools.
>
> * * * * *
>
> [N]o official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment.

As we show in Section B below, the enrollment quota plans are express racial quotas that have foreseeably led to the exclusion of black students from their local, integrated schools and their diversion to virtually all-minority schools. As we show in Section C, this foreseeable result, together with evidence of less discriminatory alternatives that the Board has not considered, is fatal to the Board's efforts to overcome the presumption of invalidity attending its exclusionary racial quotas.

B. *The Enrollment Quotas Are Presumptively Invalid Express Racial Classifications that Exclude and Segregate Substantial Numbers of Minority Students*

Both lower courts acknowledged that the enrollment quotas imposed at Gage Park and Morgan Park are express racial classifications, purposefully designed to exclude black students, but not whites, from the two high schools (Pet. App. A7, A20, A36). To achieve the Board's stated purpose of preventing the enrollments at the schools from becoming increasingly black, the quotas for black students were necessarily set at a lower level than the anticipated black enrollment at each school.

The enrollment quotas here differ from the systemwide race-conscious plans which this Court approved in *Swann*

v. *Charlotte-Mecklenberg Board of Education*, *supra*, and *McDaniel* v. *Barresi*, *supra*, 402 U.S. at 41, because the quotas not only excluded black students from their integrated "neighborhood" schools but resulted in their attending all-minority schools. They are therefore not mere "reassignment[s]" of students within the system (Pet. App. A25; see also Op. Cert. 17–19). Between 1975 and 1977, more than 1630 black students were denied admission to Gage Park and Morgan Park under the plans. During the first two years of their operation, virtually all of the excluded black students attended nearby predominantly minority schools (many of which were overcrowded) rather than the six PTP high schools with significant white enrollments on the north side of the city. Even after the Board provided bus transportation to the northside receiving schools and expanded the number of receiving schools from six to ten, the vast majority of excluded students attended all-minority schools instead. They were excluded not only from Gage Park and Morgan Park but from other nearby integrated schools as well. Thus, the plans both were intended to exclude blacks, but not whites, from their integrated neighborhood schools and resulted in a segregated education for a substantial number of those excluded.

There is no merit to the Board's suggestion (Op. Cert. 10–11) that the plans do not segregate or discriminate against excluded students because, according to the findings of the courts below (Pet. App. A18, A48), these students have "[a] guaranteed, meaningful opportunity to attend high school in an integrated setting." Under the transfer program then in effect, the closest white or integrated alternative school was 11.4 miles from Gage Park and 18.15 miles from Morgan Park. Three of the four alternative schools added in 1977 were equally distant. The fourth, Curie, is within two miles of Gage Park but it has a partial racial quota, under which only 50 black or Hispanic students from Gage Park, and 50 black students from Morgan Park may attend, and the district court made no findings on the Board's justification for this restriction on minority enrollment. The Board offered no evidence to show it had any realistic expectation that, in light of the transportation times and distances involved, the northside schools would ever attract students of any race from Gage

Park or Morgan Park. *Cf. Tasby* v. *Estes*, 572 F.2d 1010, 1014 (5th Cir. 1978), cert. dism., Nos. 78–253, 78–282, 78–283 (Jan. 21, 1980); *Mims* v. *Duval County School Board*, 329 F. Supp. 123 (M.D. Fla.), 447 F.2d 1330 (5th Cir. 1971). Moreover, the low participation rate in the transportation program (102 students out of 1630 in 1977) suggests that the "option" to attend a white or integrated school was more theoretical than real. On this record, the finding of a meaningful opportunity to attend an integrated school was clearly erroneous.[31]

Even if the opportunity provided was "meaningful," the mere provision of such an opportunity in the circumstances here does not reduce or justify the injury to black students who, as a result of their racially-based exclusion from Gage Park and Morgan Park, attended all-minority schools. No such choice was required of white students. The injury that flows from a racially exclusionary educational system was well documented in *Brown I*, *supra*. And it is settled that a school board may not shift responsibility for segregative policies to students and their parents by relying on freedom of choice or free transfer provisions. *Green* v. *County School Board*, 391 U.S. 430; *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968); *see also Goss* v. *Board of Education*, *supra*. While those cases examined transfer plans as remedies for a racially dual school system, their reasoning applies equally where authorities have excluded black students from an integrated school and offered them a free choice between nearby convenient segregated schools and distant white or integrated ones. In sum, when the Board has excluded black students from an integrated school, it cannot properly rely on the students to remedy the deficiencies in its plans by exercising the most difficult options offered them.

C. *The Board Has Failed to Rebut the Presumption that the Quota Plans Are Invidiously Discriminatory*

As we have argued above, the fact that the quotas are express racial classifications that exclude and segregate black students raises a rebuttable presumption that they

[31] Where, as here, a district court bases its finding solely on written evidence, the reviewing court is not constrained by the clearly erroneous standard. *Nash* v. *Estelle*, 597 F.2d 513, 518 (5th Cir. 1979) (en

are the product of invidious intent. The court of appeals concluded in effect (Pet. App. A20–A26) that the Board successfully rebutted this presumption by demonstrating (1) that the Gage Park and Morgan Park areas were undergoing demographic change, (2) that, because of this and because of the phenomenon of "white flight," a failure to impose quotas like those at issue would result in the transformation of Gage Park and Morgan Park into segregated black schools, and (3) that the excluded students were offered a "viable opportunity" to attend integrated high schools.

The problem with the court's analysis lies not in its assumption that school officials may take account of the possibility of "white flight" and the practicalities of achieving racial stability. These factors may properly be considered by a board of education in choosing between effective desegregation plans (see *Adams* v. *United States*, No. 79–1468 (8th Cir. Mar. 3, 1980) (en banc), petition for cert. pending, No. 79–1752; *United States* v. *School District of Omaha*, 521 F.2d 530, 546–547 (8th Cir.), cert. denied, 423 U.S. 946 (1975)) and in adopting voluntary plans to promote integration (*Parent Association of Andrew Jackson* v. *Ambach*, *supra*, 598 F.2d at 719). But just as the possibility of "white flight" cannot justify a failure to eliminate *de jure* segregation (*Monroe* v. *Board of Commissioners*, *supra*, 391 U.S. at 459; *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 490–491 (1972)), adverse public reaction to increasing minority enrollments cannot justify a plan that segregates or discriminates against minorities. As Judge Sobeloff stated in his concurrence in *Brunson* v. *Board of Trustees*, 429 F.2d 820, 827 (4th Cir. 1970) (en banc): "The force of [*Monroe*] is inescapable: dissidents who threaten to leave the system may not be enticed to stay by the promise of an unconstitutional though palatable plan." See also *Morgan* v. *Kerrigan*, 530 F.2d 401, 420–422 (1st Cir. 1976).

The problem lies, instead, in all that the court of appeals failed to take account of. First, it has failed to give serious consideration to the question of the Board's intent. Rather, the court stated in conclusory terms (Pet. App.

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banc). But even assuming that the clearly erroneous standard applies, it has been met in this case.

A22) that there was "no basis in the record to support the contention that the racial quotas imposed were intended to retard integration and to create racial imbalance at these two high schools" and that it was "evident that the Board's voluntary action was motivated by a good faith effort to promote integration not only at these two high schools but also at the alternative high schools designated under the Plans."

Second, the court's conclusion is predicated on what we have shown (pages 20–21, *supra*) to be the incorrect assumption that the excluded black students had a meaningful opportunity to attend integrated schools elsewhere.

Finally, although it paid lip service (Pet. App. A20, A26–A27) to the principle that the exclusion of black students from the two schools could be justified only if no less discriminatory alternative was available, the court did not explain its reasons for concluding that there were no such alternatives. Indeed, it simply deferred (Pet. App. A27) to "the discretion of local school authorities" regarding what it characterized as "the mechanics of integration." It thereby avoided confronting evidence that bore not only on the question of the existence of less discriminatory alternatives but also on the question of the Board's intent. That evidence, as we show below, is fatal to the Board's attempt to rebut the presumption that its racial quotas for Gage Park and Morgan Park are invalid under the Equal Protection Clause.

1. *The Board has not shown that the actual objectives of the quota plans are to prevent overcrowding and promote integration*

The court of appeals focused most of its attention on the effects of the plans on the racial composition of Gage Park and Morgan Park and largely ignored the complex of decisions made by the Board with respect to the options open to the excluded black students. Similarly, although it noted (Pet. App. A20) that "alleviation of overcrowding" was one of the Board's asserted reasons for proposing the quota plans, it failed to examine the credibility of that assertion—a matter that would obviously throw light on the Board's *bona fides*.[32]

[32] We agree with the court of appeals insofar as it considered only the asserted objective of promoting integration as a compelling gov-

The Board's decisions with respect to the options to be provided the displaced black students reveal a pattern that not only fails to rebut the presumption of invidious intent but actually confirms an invidious intent (1) to leave excluded black students to their own devices, whether or not that effectively consigned them to all-minority schools, (2) to avoid requiring any white students to share burdens imposed on black students in connection with the attempt to stabilize white enrollment at the two schools, and (3) to preserve large white majorities in schools in the vicinity of Gage Park and Morgan Park. Despite the Board's ostensible goal of promoting integration, it proceeded in a manner that virtually guaranteed that a majority of the excluded black students would end up attending nearby virtually all-minority schools. The foreseeability of this result is strong evidence of invidious intent. See, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 536 n.9 (1979) ("Dayton II"); *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279 n.25. In addition, the many inconsistencies between details of the plans' operation and supposedly normal Board policies are indicative of discriminatory intent. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977).[33]

With respect to options *within* the Gage Park attendance areas, the Board never explained why, if it was pursuing a policy of promoting racial integration, it continued to tolerate the racial separation among ninth graders in the Morgan Park attendance area, *i.e.* a Clissold branch ninth grade class that was 94.8% white in 1976 and a ninth grade class in the main building that was 68% black (see page 5 & note 13, *supra*). Adherence to the Board's neighborhood school policy can hardly be the justification since that policy obviously did not operate in the case of

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ernmental interest that could justify the racial quotas (Pet. App. A20–A21, A25–A26). While the prevention of overcrowding in schools is a legitimate, even laudable governmental objective, it is not generally permissible to use racial quotas to achieve it.

[33] *Arlington Heights*, of course, concerns standards for determining whether classifications that have racially disproportionate impact but do not on their face involve racial considerations are invidious; but this proposition applies *a fortiori* with regard to attempts to rebut a presumptively invalid racial classification.

the black students excluded from Morgan Park and Gage Park.

With respect to schools outside Gage Park and Morgan Park, the Board's policies are even more bewildering if the Board's explanation of the objectives of its quota plans is to be taken at face value. As originally implemented, the plans consigned the excluded students to choices among 18 "underutilized schools" available under the preexisting Permanent Transfer Program (PTP) that allowed transfers without respect to the impact on the racial composition of receiving schools. The chances that substantial numbers of the excluded students would attend the white or integrated schools on the list were minimized by several factors. Only at 11 all-minority schools were certain numbers of the excluded students *guaranteed* admission (in contrast to the other schools on the list, to which students could be admitted only until the school reached capacity) (page 7, *supra*). Moreover the white or integrated schools on the list were northside schools at considerable distances from Morgan Park and Gage Park, reachable only by a series of connections on public transit, and the Board had not troubled itself to inquire into distances and travel times, provide bus transportation, or even offer reimbursement for carfare (page 8, *supra*). Only after petitioners filed these suits did the Board provide bus transportation.

The Board's ostensible reason for denying the excluded students the opportunity to attend nearby white and integrated schools was that they were overutilized. But this explanation was undercut by several circumstances: (1) the Board could have coped with the overcrowding by the use of more mobile classrooms or by devising quotas for those schools effectively limiting the numbers of white students there, instead of imposing barriers to the admission of these black students; (2) the Board expressly authorized excluded black students to attend overutilized technical schools that were virtually all-minority (see page 7, *supra*); and (3) the Board apparently did not effectively *enforce* its ostensible policy against overcrowding in overutilized minority schools not on the PTP list, for more than 400 excluded students attended such schools (see pages 8–9, *supra*), including Harper (No. 44), a school attended in 1975 and 1976 by 200 out of 855 excluded Gage Park stu-

dents, with the encouragement of the Gage Park principal (see note 20, *supra*).

The most noteworthy exception to the Board's asserted policy of directing students to schools where they would not create or exacerbate overcrowding problems was, however, its treatment of Curie (No. 33), a school that in 1976 had a white enrollment of 75.7% and a utilization level of 87.7% and that was near Gage Park (App. A and App. B, *infra*). When questioned concerning the Board's unwillingness as part of its 1977 modification of the quota plans to permit more than 100 black students from Morgan Park and Gage Park to attend Curie, even though those admissions would raise its utilization level to only 90%, the Board's counsel candidly stated that the numbers were restricted because "a large influx of minority students" would be "educationally disruptive" in the "highly volatile" area of Marquette Park, where Curie was located (A. 35-36). This is precisely the kind of official response to local prejudices that is *not* permissible. See, *e.g.*, *United States* v. *Scotland Neck City Board of Education*, *supra*, 407 U.S. at 491; *Morgan* v. *Kerrigan*, *supra*, 530 F.2d at 420-422. Moreover, reliance on that consideration condemns the decision to limit transfers to Curie, even if the Board also had other reasons for doing so. For as this Court observed in *Arlington Heights* v. *Metropolitan Housing Corp.*, *supra*, 429 U.S. at 265-266, official action will be found unconstitutional even where a discriminatory purpose was only one of several considerations motivating that action.

In sum, the evidence with respect to the plans' design and actual operation suggests that the Board undertook this particular piecemeal approach to stabilizing the racial composition of Gage Park and Morgan Park solely in response to attitudes in the white community there and elsewhere and not to provide education in an integrated setting for all the students there. For that reason, the Board eschewed a more comprehensive solution that would have avoided the segregation of a majority of the excluded black students and distributed the burden among black and white students alike. As we show below, a number of such solutions were available.

2. *The Board failed to demonstrate that its asserted objectives could not be achieved by less discriminatory alternatives*

Even assuming that the Board's asserted objectives of preventing segregation and overcrowding were its actual purposes, the Board must nevertheless demonstrate that its objectives could not be accomplished by less discriminatory alternatives. *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *Lee* v. *Nyquist*, 318 F. Supp. 710, 720 (W.D.N.Y. 1970) (three-judge court), aff'd, 402 U.S. 935 (1971). The Board has a heavy burden of justifying plans that purposefully exclude and segregate some minority students, even if they were designed to preserve integration for others.

The Board failed to carry that burden in this case. The Board presented no expert testimony on the need for the plans, their efficacy, or the selection of the particular quota levels set for each school. Although alternative means were suggested by black parents at Morgan Park at the time the plans were originally proposed (page 6, *supra*), the Board gave no serious consideration to these alternatives and instead implemented plans that had the adverse consequences predicted by black parents.

In 1977, after the district court stated that the plans were unconstitutional, petitioners suggested a number of alternative means of preserving integrated student bodies at Gage Park and Morgan Park High Schools, including a proposal to pair Gage Park with Curie, a predominantly white school located two miles from Gage Park. As noted above, the Board's counsel rejected the proposal because of a feared adverse reaction by white residents of Marquette Park, Curie's attendance area. A second proposal, the pairing of Morgan Park and Washington, was stated to be unacceptable because it would involve continued use of mobile classroom units, which are already widely used in the Chicago public school system. Neither of these reasons is sufficient, on this record, to satisfy the Board's burden of demonstrating that these less discriminatory alternatives are not feasible.[34]

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[34] It may be true, as respondents argue (Op. Cert. 11), that pairing Gage Park and Curie is presently not as attractive as it was in 1975–1977 because Curie's minority enrollment as of October, 1979 has in-

Rather than attempt to prove that it gave adequate consideration to alternative means of stabilizing enrollments at the two schools, the Board argues, and the court of appeals found (Pet. App. A23), that "racial quotas are a necessary means of arresting *de facto* segregation in the public schools." But as our discussion above (pages 17–18, *supra*) indicates, school districts have successfully used a number of alternative desegregation techniques in a nondiscriminatory fashion to maintain racial balance and stabilize enrollments, including pairing, redistricting, and magnet schools.[35] Properly implemented, these techniques have the advantage of distributing the inconveniences of the plan on an equitable basis among different racial groups. Even more important, they do not move substantial numbers of black students from integrated to segregated schools.

With respect to enrollment quotas in particular, an important distinction exists between their use at only one or two neighborhood schools and their use as part of a comprehensive desegregation plan.[36] In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), the Court approved racially-based attendance assignments in which "each school" in the system had "a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." The use of enrollment quotas as part of a systemwide desegregation plan

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creased to 40%. But while Curie's current minority enrollment may bear on alternatives now available to the Board, it does not excuse the Board's failure to consider pairing in 1975 or its rejection of this specific proposal in 1977, when Curie's enrollment was 73.2% white. Significantly, two of the northside schools selected by the Board to receive excluded students—Lake View (No. 7) and Senn (No. 66)—had minority enrollments exceeding 50% in 1975 and 1976 (Pet. App. 41A).

[35] Chicago's experience with Young, a city-wide magnet high school (see note 12, *supra*), demonstrates that magnets can be successfully used in Chicago to attract students of all races to a particular school. Unlike the enrollment quotas at Gage Park and Morgan Park, the quotas at Young do not deprive any students of their neighborhood school options and do not enhance existing segregation. Whites as well as blacks are excluded by the enrollment quotas at Young (Op. Cert. 12; R. 13, attachment 1.).

[36] As our discussion of such desegregation measures as pairing proposals indicates, we do not contend that *only* a systemwide plan would, on this record, satisfy constitutional requirements.

presents at least three advantages over their use in this case. First, if they are imposed at every school, enrollment quotas will not have a discriminatory impact on one particular racial group.[37] Second, a properly designed systemwide desegregation plan reduces racial isolation in the school system as a whole, rather than shifting racial imbalance from one set of schools to another.

Finally, a systemwide approach ensures that the school authorities have fully considered the impact of their actions beyond the particular schools that are the subjects of those actions. *Keyes* v. *School District No. 1*, 413 U.S. 189, 203 (1973). In Chicago, where more than 75% of the students are minority, a policy of focusing only on preserving racial balance in some schools will increase the likelihood that other schools in the system will be segregated. In school districts with small white enrollments, an adequate desegregation plan need not necessarily distribute white students equally throughout the public schools if such action would impair racial stability. *Tasby* v. *Estes*, *supra*, 572 F.2d at 1013; *Calhoun* v. *Cook*, 522 F.2d 717 (5th Cir. 1975); *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211, 1221 (5th Cir. 1970) (en banc). Nevertheless, the implications of such decisions for the school system as a whole must be considered and justified. Cf. *Lee* v. *Macon County Board of Education*, No. 79-2499 (5th Cir. May 7, 1980), slip op. 5403; *United States* v. *Texas Education Agency*, No. 78-2526 (5th Cir. Aug. 9, 1979), slip op. 6806.[38]

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[37] See, *e.g.*, *Linker* v. *Unified School District No. 259*, 344 F. Supp. 1187 (D. Kan. 1972), aff'd in unpublished opinion, *sub. nom. Farha* v. *Unified School District No. 259* (10th Cir. No. 72-1691, May 31, 1973), cert. denied, 414 U.S. 1092 (1973), where the court approved a desegregation plan for elementary schools in Wichita, Kansas, which used a lottery to select students for reassignment to achieve racial balance. The court specifically rejected the argument that the plan selected children in an arbitrary and capricious manner in violation of the Fourteenth Amendment because "*all* elementary students in District 259 were subjected to the lottery." *id.* at 1201 (emphasis in original).

[38] Respondents note (Op. Cert. 10, 12) that as of March 1980, the Board expanded the list of available receiving schools to include five white or integrated schools on the south side of Chicago. This modification, which presumably becomes effective in September 1980, is not in the record considered by the courts below. Moreover, the Board has

Parent Association of Andrew Jackson v. *Ambach*, 598 F.2d 705 (2d Cir. 1979), provides one illustration of the permissible use of enrollment quotas on a systemwide basis. There the New York City Board of Education voluntarily adopted a plan to desegregate an all-minority high school. The plan gave all students attending the school the option of attending any high school in the city with a white enrollment exceeding 50% or the borough's average white enrollment, whichever was higher. Minority enrollment at the receiving schools was limited by a set of quotas designed to prevent any one receiving school from changing rapidly from white to black as a result of the integration program.[39] The purposes of the quotas were to preserve integration in as many schools as possible and to maintain white enrollment in the school system as a whole, and the Second Circuit properly held that racial quotas could be used in such a comprehensive effort to prevent resegregation of the school system.

The quotas used in *Andrew Jackson* were structured differently from those imposed here. Since they were applied on a systemwide basis, they resulted in a net increase in integration without creating additional segregation in the process. Students who were not able to opt out of Jackson because of the quotas were provided enriched academic and vocational programs. 598 F.2d at 712 n.3. Here, in contrast, the quotas shift racial imbalance from Gage Park and Morgan Park to the receiving schools.

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not shown that students excluded by the quotas can reasonably be expected to attend these schools or that this modification completely and irrevocably eradicates the effects of the alleged violation. *County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979). Even if some excluded students attend these integrated schools, the Board still must justify both its objectives and its chosen means.

[39] Minority students from Jackson could not attend a receiving school if admission of such students, combined with admission of minority students from other integration programs or through demographic changes in the school's attendance area, (a) decreased the receiving school's white-minority balance by 40% in any one school year or (b) produced a change in that balance that exceeded " 'one-fourth of the difference between the school's current white enrollment and a 50% white enrollment,' whichever is less." 598 F.2d at 712. Although the court of appeals approved the Board's goal of preserving integration in the system as a whole, the case was remanded for further justification of the particular quota levels selected.

Rather than assisting minority students in opting out of a segregated environment, the plans actively discriminate against minorities by excluding them (but not their white neighbors) from their neighborhood schools and placing most of them in virtually all-minority ones. The plans are therefore impermissible under the Equal Protection Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1980

APPENDIX A

1975 AND 1976 ENROLLMENT AND PERCENT OF PERMANENT CAPACITY[1] FOR CHICAGO PUBLIC HIGH SCHOOL FACILITIES[1]

District		1975 Enrolment	1975 Percent of Cap.	1976 Enrolment	1976 Percent of Cap.
1	*Roosevelt (No. 1)[2]	1756	96.8	1880	103.6
	Taft (No. 2)	3204	99.8	3250	105.8
	*Van Steuben (No. 3)	1072	86.5	1049	91.0
2	*Mather (No. 4)	1622	93.0	1674	95.9
	*Sullivan (No. 5)	1365	95.5	1397	99.6
3	Amundsen (No. 6)	1746	104.2	1818	108.5
	*Lakeview (No. 7)	2093	98.3	2114	101.0
	Lane Tech (No. 8)	5138	100.4	4908	95.9
4	Austin (No. 9)	3298	119.7	3389	122.9
	Austin Branch (No. 10)	921	103.5	1087	124.5
	Steinmetz (No. 11)	2763	116.4	2750	115.9
5	Foreman (No. 12)	1828	127.8	1786	127.4
	Kelvyn Park (No. 13)	1620	118.6	1690	126.1
	Schurz (No. 14)	3994	101.3	4096	103.9
	Prosser Voc. (No. 15)	1459	104.5	1519	108.8
6	Clemente (No. 16)	4014	114.7	4366	92.7
	*Wells (No. 17)	1817	96.4	1974	104.7
7	Metro (No. 18)	341	68.2	351	70.2
	*Waller (No. 19)	1300	62.1	1333	63.7
	Jones Comm. (No. 20)	1067	101.3	1079	102.5
	Cooley Voc. (No. 21)	626	49.7	619	49.1
8	*Manley (No. 22)	1832	75.0	2004	82.0
	*Marshall (No. 23)	1621	60.3	1637	68.0
9	*Crane (No. 24)	2312	82.8	2390	85.6
	Young Magnet (No. 25)	1162	55.4	1791	82.8
	Cregier Voc. (No. 26)	800	109.7	834	114.4
10	*Farragut (No. 29)	3044	91.2	3138	88.1
11	Phillips (No. 30)	3056	100.7	3101	102.1
	Dunbar Voc. (No. 32)	2466	130.5	2464	130.4
12	Curie (No. 33)	3113	95.1	3154	87.7

[1] The sources of this data are Pltf. Ex. 14 (enrollment and percent of permanent capacity as of January 30, 1976) and Pltf. Ex. 15 (enrollment and percent of permanent capacity as of September 30, 1976). These exhibits do not provide permanent capacity figures for the following schools, which appear in Appendix B: Cregier Nursing, Simpson Family Living Center, Chicago Vocational Apprentice, and Washburne Trade.

[2] Schools marked with an asterisk appeared on the Board's PTP list of underutilized schools.

District		1975 Enrolment	1975 Percent of Cap.	1976 Enrolment	1976 Percent of Cap.
	Gage Park & Branch[3] (No. 34 & 35)	2441	106.0	2303	96.7
	Kelly (No. 36)	2417	138.5	2469	141.5
	Kennedy (No. 39)	2496	127.7	2427	110.4
13	*DuSable (No. 40)	2657	87.5	2810	92.6
14	*Hyde Park (No. 41)	1937	89.5	2433	112.4
	*Kenwood (No. 42)	1911	91.3	1923	91.8
15	Bogan (No. 43)	2738	130.4	2651	126.6
	Harper (No. 44)	2365	111.1	2459	115.5
	Hubbard (No. 45)	2311	127.3	2228	110.1
	Lindblom Tech (No. 46)	2535	117.0	2530	116.8
16	Harlan (No. 47)	3018	137.2	3050	138.7
	Chicago Voc. (No. 48)	4169	109.5	4125	108.4
17	Bowen (No. 50)	3284	101.2	3219	99.2
	Washington (No. 51)	2337	119.6	2263	115.8
18	Julian (No. 52)	1890	82.2	2487	100.4
	Morgan park (No. 53)	3323	128.6	2944	114.0
19	Collins (No. 55)	[4]	[4]	1038	58.3
	*Harrison (No. 56)	2557	83.3	2061	67.1
20	Calumet (No. 59)	3757	143.5	3698	141.3
	Simeon Voc. (No. 60)	1840	126.2	1890	129.6
21	Englewood (No. 61)	2315	79.0	2128	148.8
	Parker (No. 62)	2131	117.4	2291	126.2
22	Hirsch (No. 63)	1700	103.7	1720	104.9
	South Shore (No. 64)	3278	102.1	3408	106.1
23	King (No. 65)	2323	102.4	2413	106.3
24	*Senn (No. 66)	2508	89.8	2618	93.8
25	Orr (No. 67)	2274	98.9	2709	109.3
	Flower Voc. (No. 68)	879	72.4	903	74.3
	Westinghouse Voc. (No. 69)	1985	102.1	2000	102.9
26	*Tilden (No. 70)	2477	92.2	2747	102.2
	Richards Voc. (No. 71)	847	142.6	881	148.3
27	*Carver (No. 72)	2017	89.6	2073	91.4
	Corliss (No. 75)	1813	78.8	2477	100.0
	Fenger (No. 73)	3619	157.1	3575	162.6

[3] In 1975 and 1976, all ninth grade students attended the Gage Park "branch" which is on the same campus as the high school, is part of the permanent facility, and is used for ninth graders only (Stip. 6A).

[4] Figures unavailable.

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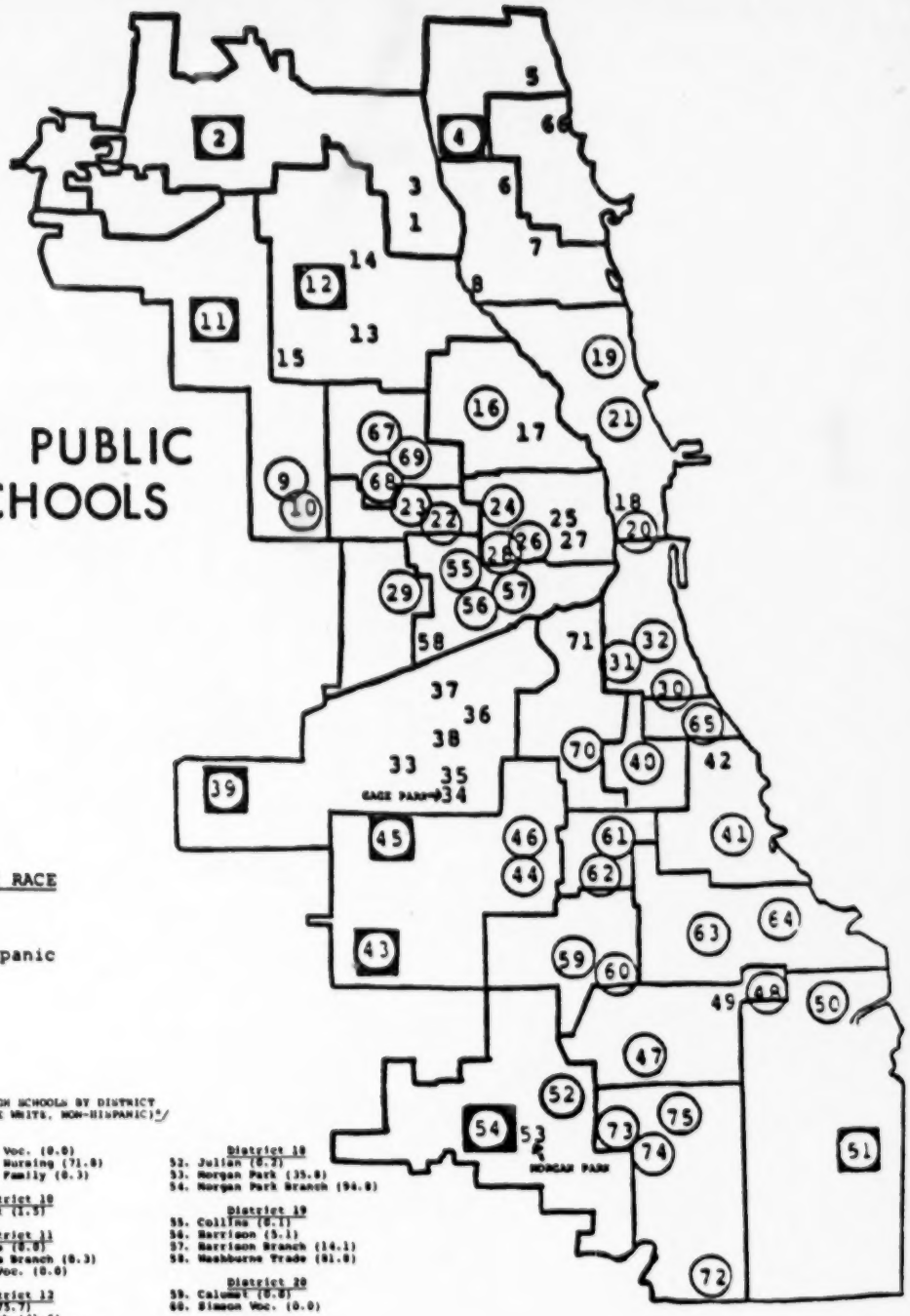
CHICAGO PUBLIC HIGH SCHOOLS



KEY TO 1976 ENROLLMENT BY RACE

(9) ▸ 85% minority

[11] ▸ 85% white, non-Hispanic

13 Other

CHICAGO HIGH SCHOOLS BY DISTRICT (PERCENTAGE WHITE, NON-HISPANIC)*/

District 1
1. Roosevelt (76.0)
2. Taft (90.8)
3. Von Steuben (63.2)

District 2
4. Mather (89.6)
5. Sullivan (73.4)

District 3
6. Amundsen (88.1)
7. Lakeview (43.6)
8. Lane Tech (75.0)

District 4
9. Austin (0.1)
10. Austin Branch (0.3)
11. Steinmetz (90.9)

District 5
12. Foreman (95.2)
13. Kelvyn Park (58.3)
14. Schurz (75.3)
15. Prosser Voc. (73.2)

District 6
16. Clemente (9.7)
17. Wells (16.3)

District 7
18. Metro (65.8)
19. Waller (9.1)
20. Jones Commercial (7.4)
21. Cooley Voc. (0.8)

District 8
22. Manley (0.8)
23. Marshall (0.0)

District 9
24. Crane (0.8)
25. Young Magnet (28.9)
26. Crosier Voc. (0.0)
27. Crosier Nursing (71.8)
28. Simpson Family (0.3)

District 10
29. Farragut (1.5)

District 11
30. Phillips (0.0)
31. Phillips Branch (0.3)
32. Dunbar Voc. (0.0)

District 12
33. Curie (75.7)
34. Gage Park (41.6)
35. Gage Park Branch (42.6)
36. Kelly (78.1)
37. Kelly Branch-Davis (67.2)
38. Kelly Branch-Gunsaulus (84.5)
39. Kennedy (69.0)

District 13
40. DuSable (0.0)

District 14
41. Hyde Park (0.0)
42. Kenwood (24.4)

District 15
43. Bogan (97.4)
44. Harper (0.0)
45. Hubbard (93.4)
46. Lindblom Tech (0.1)

District 16
47. Marian (0.0)
48. Chicago Voc. (0.5)
49. Chicago Voc. Appr. (62.5)

District 17
50. Bowen (3.6)
51. Washington (93.3)

District 18
52. Julian (0.7)
53. Morgan Park (35.8)
54. Morgan Park Branch (94.8)

District 19
55. Collins (0.1)
56. Harrison (5.1)
57. Harrison Branch (14.1)
58. Washburne Trade (81.8)

District 20
59. Calumet (0.8)
60. Simeon Voc. (0.0)

District 21
61. Englewood (0.0)
62. Parker (0.0)

District 22
63. Hirsch (0.0)
64. South Shore (0.1)

District 23
65. King (0.0)

District 24
66. Senn (44.0)

District 25
67. Orr (3.7)
68. Flower Voc. (0.0)
69. Westinghouse Voc. (0.0)

District 26
70. Tilden (11.1)
71. Richards Voc. (36.3)

District 27
72. Carver (0.0)
73. Fenger (0.6)
74. Fenger Branch-Curtis (0.6)
75. Corliss (0.0)

*/ This map was prepared by the United States and is derived from the following record sources: Plif. Ex. 2 (racial composition of each school), Plif. Ex. 11 (street addresses of the schools), and Plif. Ex. 36 (a map reflecting the locations of the public high schools and their racial compositions). The district lines, which do not appear in the record, were taken from a map showing the location of all public schools prepared in September 1978 by the Department of Facilities Planning of the Chicago Board of Education. This map was obtained from the Board by the Department of Health, Education, and Welfare in the course of its investigation in 1977 and 1978 of the city's eligibility for federal funding; this map, along with the street addresses, also provided the source for the relative locations of 9 schools (mainly branches) not appearing on Plif. Ex. 36.